2000

State of Utah v. Santiago A. Acosta-Torres : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	
	:	Case No. 20001145-CA
vs.	:	
SANTIAGO A. ACOSTA-TORRES, Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF CHILD ABUSE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-109 (Supp. 2000), IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction of child abuse, a second degree felony, in violation of UTAH CODE ANN. § 76-5-109 (Supp. 2000), in the Third Judicial District, Salt Lake County, the Honorable J. Dennis Frederick presiding.

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Has defendant preserved his claim that the district court erred by considering his deportation status at sentencing? If not, has he established "plain

error" or "exceptional circumstances"? Alternatively, is the claimed error sufficient to warrant review as an illegal sentence?

If defendant has not preserved his appeal, his claim is not properly before this court and no standard of review applies unless he can demonstrate some exception to the preservation requirement, i.e., "plain error" or "exceptional circumstances" that may result in manifest injustice. *See State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. To establish plain error, defendant must show that the error occurred and that it was obvious and harmful. *See State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997). To establish "manifest injustice," defendant must show, at a minimum, a "truly exceptional situation[]" involving "rare procedural anomalies." *State v. Irwin*, 924 P.2d 5, 8, 11 (Utah App. 1996); *see also Holgate*, 2000 UT 74, at ¶ 12.

Whether an appellate court may review the legality of a sentence under rule 22(e), Utah R. Crim. P., involves the interpretation of a rule, a legal determination. *See State v. Brooks*, 908 P.2d 856, 859 (Utah 1995).

2. Did the district court consider defendant's status as an illegal alien when it sentenced him to an indeterminate prison term rather than imposing a jail term followed by probation? If so, did the trial court violate the Supremacy Clause, due process, or equal protection?

Review of a trial court's sentencing decision is for abuse of discretion. *See State v Montoya*, 929 P.2d 356, 358 (Utah App. 1996). The trial court's decision

will be upheld unless "no reasonable [person] would take the view adopted by the trial court." *State v. Gerrard*, 584 P.2d 885 (Utah 1978). "So long as basic constitutional safeguards of due process and procedural fairness are afforded, the trial court has broad discretion in considering any and all information that reasonably may bear on the proper sentence." *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997). Whether the trial court has acted consistently with constitutional safeguards is a question of law, reviewable for correctness. *See State v. Arviso*, 1999 UT App 381, ¶ 5 n.4, 993 P.2d 894.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions, statutes, and rules are included in Addendum A:

Utah R. Crim. P. 22(e)
U.S. CONST. art. VI, cl. 2 (Supremacy Clause)
U.S. CONST. amend. XIV, § 1 (Due Process and Equal Protection Clauses)

STATEMENT OF THE CASE

Defendant was charged by information with one count of child abuse. R. 4-5. Defendant pled guilty, and the State dismissed an unrelated forgery count. R. 80, 87. The district court judge sentenced defendant to an indeterminate prison term of not less than one year nor more than fifteen years. R. 107-108. Defendant timely appealed. R. 111.

STATEMENT OF THE FACTS

No trial was held. This statement of the facts therefore reflects the crime and defendant's background as detailed in the "Official Version of the Offense" in the PSI. *See* PSI at 2-4.

The Crime

The victim in this case was a three-month-old baby boy. On June 28, 2000, the baby's mother left him alone with defendant while she went to the store. When she returned, the baby had several round bruises on his face. Some of the bruises had trails where the baby had been slapped and the fingers had left marks. The baby's left ear was very swollen and bruised. The baby had a partial palm print above the ear and bruising over his eyes. He also had finger-shaped bruises on his left hip on his back above his diaper. The mother, defendant, and two friends took the baby to the hospital. Hospital personnel contacted police officers who came to the hospital, took pictures, and interviewed the four adults. *Id.*

After receiving his *Miranda* warnings, defendant first said that the baby was sleeping in his car seat with a toy and that the toy must have injured him. When interviewed a second time, he said that he had accidentally dropped the baby, but did not strike him. The police officers then showed defendant the pictures of the baby and pointed to what appeared to be finger and hand marks on the side of the baby's head. Defendant then stated that the baby would not stop crying after he had

been dropped and so defendant "flicked" him several times on the side of his head. *Id.*

A week later two different police officers interviewed defendant. At that time defendant stated that the baby was a "brat" and admitted that he did not drop the baby. *Id.*

The baby apparently did not suffer any long term or permanent disability as a result. *See* PSI at 5.

Defendant's Background

Defendant, a nineteen-year-old Mexican national, came to the United States in 1993 at the age of twelve. *Id.* at 11. His Utah State juvenile court records reveal thirty referrals with six status convictions between 1996 and 1999. *Id.* at 15. He was placed on probation as a juvenile for burglary in 1996, but transferred for noncompliance to Youth Corrections later that year. *Id.* He was released from Youth Corrections supervision in March 1999. *Id.*

Defendant turned eighteen in April 1999, eighteen months prior to the current offense. During that eighteen-month period, he was convicted on one assault count. *Id.* at 10. He was also charged with forgery, the charge dismissed in connection with his plea in this case. *Id.* The PSI investigator also noted that defendant was "less than cooperative throughout the investigative process." *Id.* at 16.

The PSI investigator noted that the Immigration and Naturalization Service (INS) intended to implement deportation proceedings after sentencing. *Id.* She observed that the agency was concerned about defendant's previous assault charge and his failure to cooperate. She stated that "defendant would have been an appropriate candidate for probation after a lengthy period of jail," but observed that INS deportation plans limited the options available to Adult Probation and Parole (AP&P). *Id.* She therefore recommended that defendant be sentenced to the indeterminate prison term prescribed by law and, upon parole, be placed in INS custody for deportation. *Id.* at 17.

The Sentencing Hearing

The district court judge, after hearing from defendant, the prosecutor, and defense counsel and after viewing the photographs of the injured baby, sentenced defendant to the indeterminate prison term. R. 167:7. The judge stated, "I am not of the view that the recommendation from AP&P is inappropriate. Indeed, anyone that would beat up on a child of this nature, in my estimation, really needs some serious thinking time." *Id.* The judge further reasoned, "I am concerned that you might allow yourself to fly off the handle again and endanger some other innocent victim out in society." *Id.* He did not mention defendant's status as an illegal alien or INS deportation plans. *See id.*

SUMMARY OF THE ARGUMENT

1. Defendant has not preserved his claim that the district court erred by considering his deportation status at sentencing. While defendant stated that he was "bothered" by the portions of the PSI linking AP&P's prison recommendation to INS deportation plans, he did not object to the district court's sentence or clearly and specifically state any ground for objection. Defendant did not mention the Supremacy Clause, due process, or equal protection, let alone specify them as grounds for objection. Further, defendant has not demonstrated "plain error" or "exceptional circumstances" to justify review in the absence of preservation. Finally, because the claimed error does not render the sentence illegal, defendant cannot obtain review under rule 22(e), Utah R. Crim. P.

2. Defendant's claim also fails on the merits. First, defendant has not demonstrated that the district court judge considered defendant's illegal status or INS deportation plans when he imposed sentence. Second, even if he did, consideration of those factors does not violate the Supremacy Clause, due process, or equal protection.

ARGUMENT

I.

DEFENDANT HAS NOT PRESERVED HIS CLAIM AND HAS NOT SHOWN "PLAIN ERROR" OR "EXCEPTIONAL CIRCUMSTANCES"; MOREOVER, HE CANNOT OBTAIN REVIEW UNDER RULE 22(e) BECAUSE HIS SENTENCE IS NOT ILLEGAL

A. Defendant has not preserved this issue and has demonstrated no exception to the preservation requirement.

Defendant argues that the district court based defendant's sentence, in part, on his status as an illegal alien subject to deportation, in violation of the Supremacy Clause, due process, and equal protection. Br. Aplt. at 7-20.

Defendant did not preserve these grounds for objection. "'Trial counsel must state clearly and specifically all grounds for objection.'" *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (quoting *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993)). Indeed, "[t]he objection must "'be specific enough to give the trial court notice of the very error' of which counsel complains.'" *Bryant*, 965 P.2d at 546 (quoting *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 460 (Utah App. 1996) (citation omitted)).

Defendant's only reference to this issue below was a comment by defense counsel at sentencing. Noting that the PSI investigator had recommended prison, defense counsel stated that he was "bother[ed]" by statements in the PSI about INS deportation plans and defendant's candidacy for probation. R. 167:3-4. Defendant did not, however, object to the inclusion of the material in the PSI or argue that the

district court's consideration of the information was improper, let alone unconstitutional. He did not refer to the Supremacy Clause, to due process, or to equal protection. Defendant's statement that he was bothered by the evaluative summary was insufficient to give the court notice of the errors he now claims are preserved for review.

Defendant also argues in a footnote that he is entitled to review, even absent preservation, on the basis of "plain error" and "exceptional circumstances." Br. Aplt. at 20 n.2. To establish plain error, defendant must show that (i) an error occurred, (ii) the error was obvious, and (iii) the error was harmful. *See State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). Error is not obvious "where there is no settled appellate law to guide the trial court." *See State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997).

No appellate case law forbids consideration of a defendant's illegal immigration status or his pending deportation. Cases cited by defendant, *State v. Arviso*, 1999 UT App 381, and *State v. Johnson*, 856 P.2d 1064 (Utah 1993), are inapposite.

In *Arviso*, this Court held that a trial court erred when it suspended a prison term on the condition that the defendant not reenter this country. *Id.* This action interfered with the exclusive federal power over admission and exclusion of aliens.

Id. at ¶¶ 6-7. It did not forbid consideration of the ways in which the *federal* exercise of that power might affect a sentence.

Johnson merely held that sentencing may not be based on unreliable evidence. 856 P.2d at 1071. The unreliable evidence in *Johnson* was a report, consisting of triple hearsay, summarizing the statements of a four-year-old child. 856 P.2d at 1070-71.

Nothing in either case suggested that illegal alienage or imminent deportation was an improper or unreliable sentencing consideration. Defendant has not demonstrated that error, if any, was obvious, and thus has not met the plain error standard.

Defendant also argues "exceptional circumstances." Defendant cites *State v. Irwin*, 924 P.2d 5, 8 (Utah App. 1996) (citation omitted), holding that "unique procedural circumstances . . . permit consideration of the merits of [certain] issues on appeal" even though they were not raised below. Defendant argues that, absent appellate review, manifest justice would occur here because "defense counsel alerted the trial judge to a concern with imposing a harsher sentence based on deportation status." Br. Aplt. at 21 n.2. Defendant effectively argues, contrary to precedent, that specific grounds for an objection are unnecessary where defendant notifies the court that something is troublesome or that it "bothers" him.

Moreover, defendant does not detail any "unique procedural circumstance" militating in favor of review of this unpreserved issue.

Thus, the issue was not preserved. Neither has defendant demonstrated an exception to the preservation requirement. This claim is therefore not properly before this court. *See Holgate*, 2000 UT 74, at ¶ 11 ("preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred").

B. The sentence imposed was not illegal.

Defendant argues alternatively that "even if the claims were not preserved, this Court can correct the illegal sentence pursuant to Utah R. Crim. P. 22(e)." Br. Aplt. at 20. Defendant cites *State v. Brooks*, 908 P.2d 856, 859-860 (Utah 1995), as authority that "an appellate court can vacate an illegal sentence even if the claim is raised for the first time on appeal." Br. Aplt. at 20.

Brooks does permit vacation of an illegal sentence on appeal. Defendant cites no authority, however, in support of his implicit argument that the sentence imposed in this case is an illegal sentence.

Rule 22(e), Utah R. Crim. P., provides that "[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time."[1] The rule

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[1]Rule 22(e) was enacted as statute in 1980 and codified at UTAH CODE ANN. § 77-35-22(e). *See* 1980 Utah Laws ch. 14, § 1. As with other statutory rules of procedure and evidence contained in the code, rule 22(e) was repealed as statute and adopted as a (continued...)

codified precedent established by Utah courts permitting review of sentences so "obviously illegal" that "it would . . . be unconscionable not to examine the issue." *See Rammell v. Smith*, 560 P.2d 1108, 1109 (Utah 1977). These included sentences imposed by a court having no jurisdiction, sentences not authorized by law, and sentences "of an entirely different character than that which the statute prescribes." *Id.*

Since 1980, Utah courts have held or reasoned that illegal sentences may occur in the following circumstances:

- The sentence provides a punishment that does not conform to the statutes governing the crime of conviction. *See State v. Higginbotham*, 917 P.2d 545, 551 (Utah 1996) (statute "d[id] not authorize a consecutive, determinate two-year [enhancement] term"); *State v. Babbel*, 813 P.2d 86 (Utah 1991), 86-88 (sentence to indeterminate term was illegal and void where statute mandated minimum mandatory sentence; corrected sentence was lawful, even though harsher); *State v. Lorrah*, 761 P.2d 1388, 1389-90 (1988) (sentence to indeterminate term with recommended maximum was illegal where statute requires a minimum mandatory term); *State v. Kenison*, 2000 UT App 322, ¶¶ 6, 14, 14 P.3d 129 (under statute in effect

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[1](...continued)
court rule in 1990. *See* UTAH CODE ANN. § 35 (repealed) (1999 Replacement Part); Compiler's Notes, Utah Rules of Criminal Procedure (2001).

at the time of sentencing, trial court should have sentenced for misdemeanors, not felonies); *State v. Schweitzer*, 943 P.2d 649, 653-654 (Utah App. 1997) (statute did not authorize trial court order that defendant's property be sold to satisfy restitution); *State v. Montoya*, 929 P.2d 356, 360 (Utah App. 1996) (statute "d[id] not empower the trial court to impose a determinate sentence exceeding one year"); *State v. Peterson*, 869 P.2d 989, 992 (Utah App. 1994) (one-year jail sentence was illegal where statute mandated indeterminate one to fifteen year term).

- The sentence is ambiguous. *See Parry v. State*, 837 P.2d 998, 999 (Utah App. 1992) (judge's oral pronouncement referred to "aggravated burglary, a *third* degree felony," where statute treated aggravated burglary as a first degree felony).
- The trial court lacks jurisdiction. See *State v. Grate*, 947 P.2d 1161, 1168 (Utah App. 1997) (trial court lacked jurisdiction to revoke probation where defendant was not charged with probation violation within his original probation term).

Utah courts have also held or reasoned that alleged errors do *not* constitute illegal sentences in the following circumstances:

- The defendant challenges the conviction, not the sentence. *See State v. Finlayson*, 2000 UT 10, ¶ 8, 994 P.2d 1243 (merger claim was challenge

to conviction, not to sentence; review under rule 22(e) was error); *State v. Brooks*, 908 P.2d 856, 858, 860 (Utah 1995) (refusing to address defendant's argument that 'his convictions for robbery and burglary illegally punish[ed] him twice for the same crime," appellate court stated that it could not "review the legality of a sentence under rule 22(e) when the substance of the appeal is . . . a challenge, not to the sentence itself, but to the underlying conviction"); *State v. Scheel*, 823 P.2d 470, 473 (Utah App. 1991) (argument that defendant was convicted for conduct prohibited both by arson and aggravated arson statutes was not a challenge to the imposition of an incorrect and therefore void sentence and could not be raised for the first time on appeal); *see also State v. Powell*, 872 P.2d 1027, 1033 (Utah 1994) (argument that mens rea for second degree murder and manslaughter did not differ and that defendant should have been sentenced to the lesser manslaughter penalty was not a challenge to an illegal sentence that could be corrected at any time under rule 22(e)).

- The trial court bases its sentencing on inappropriate factors. *State v. Wareham*, 801 P.2d 918, 919-920 & n.2 (Utah 1990) (defendant asserted that sentencing enhancement was based on aggravating factors committed prior to the date of the enhancement statute and therefore in violation of ex post facto protections; court held that this issue should have been

raised on appeal and that it did not constitute an illegal sentence under rule 22(e)).[2]

Defendant's claimed error does not constitute an illegal sentence under Utah law. His sentence is not similar to those Utah courts have declared illegal. The trial court did not impose a statutorily unauthorized sentence. The sentence was not ambiguous. Jurisdiction was not lacking.

Although the illegal sentence issue arose in a different procedural context, defendant's case most closely resembles *Wareham*, 801 P.2d at 918. Wareham filed a motion to reduce his sentence following an unsuccessful first appeal. *Id.* at 919. Although observing that an illegal sentence could be challenged at anytime, the *Wareham* court refused to address defendant's claim, holding that it should have been brought on appeal, i.e., on Wareham's first appeal. *Id.* at 919 n.3, 920. Like defendant in the instant case, Wareham alleged that the trial court based its sentencing on an inappropriate factor. *Id.* at 919-920. Like defendant, Wareham alleged a constitutional violation. *Id.*

Here, while defendant raises this issue as part of his first appeal, he attempts to circumvent the normal appellate process by alleging that his sentence is illegal. While the procedural posture differs, Wareham's analysis is controlling here. An

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[2]*But cf. State v. Maguire,* 1999 UT App 45, ¶ 6 n.1, 975 P.2d 476 (stating in dicta that ex post facto claim based on resentencing after completion of original sentence and voluntary withdrawal of plea would be proper under rule 22(e)).

allegation that a sentence is based on an inappropriate, even unconstitutional, factor does not render the sentence illegal.

Further, as a matter of policy, this court should not treat defendant's alleged error as an illegal sentence. In determining what kinds of errors constitute illegal sentences, courts must attempt to "balance the need for the finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law." *Carter v. State*, 786 So.2d 1173, 1176 (Fla. 2001); *see also State v. Murray*, 744 A.2d 131, 134 (N.J. 2000).[3]

Several consequences attach to the classification of a sentencing error as an illegal sentence. First, an illegal sentence is reviewable at any time, a characteristic affecting the finality of judgments. *See* Utah R. Crim. P. 22(e). Further, because

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[3]Florida and New Jersey courts have systematically addressed the definition of illegal sentences. Florida courts have defined an "illegal sentence" as a sentence that "imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." *Carter*, 786 So.2d at 1181. Examples include sentences that exceed the maximum statutory period for a particular offense or that fail to credit a defendant with jail time served. *Id.* A sentence is not illegal simply because it encompasses a "patent sentencing error[]." *Id.*

In New Jersey, a sentence "in excess of or otherwise not in accordance" with statutory mandates is illegal. *Murray*, 744 A.2d at 134. A sentence may also be illegal where "it was not imposed in accordance with law." *Id.* at 135. A sentence may fail, for instance, to satisfy required statutory presentencing conditions and, as a result, its imposition would not be in accordance with law. *Id.* In New Jersey, where statute prohibits the confinement of a defendant in a youth correctional facility after he has served a prison sentence, sentencing to a youth facility can constitute a sentence "not imposed in accordance with law." *Id.* Likewise, where statutory law mandates a term of parole ineligibility, a sentence that fails to include that term is "not imposed in accordance with law." *Id.*

an illegal sentence is a void sentence, a new sentence imposed after vacation of an illegal sentence is not restricted by the terms of the illegal sentence and may be harsher. *See Babbel*, 813 P.2d at 88. Indeed, the State (not just the defendant) may seek vacation of an illegal sentence. The State may claim, for instance, that the the punishment imposed is less severe than the punishment statutorily mandated. *See id.* at 86. In light of these factors, courts have carefully restricted the kinds of sentencing errors that may render a sentence illegal.

Under Utah law, a rule 22(e) illegal sentence is a "sentence that does not conform to the crime of which the defendant has been convicted" or a sentence "imposed in an illegal manner." *State v. Parker*, 872 P.2d 1041 (Utah App. 1994). It is a "patently" or "facially illegal" sentence. *See Brooks*, 908 P.2d at 860 ("patently illegal"); *Schweitzer*, 943 P.2d at 654 ("patently illegal"); *see also Edwards v. State*, 918 P.2d 321, 324 (Nev. 1996) ("facially illegal"); *Commonwealth v. Harrison*, 661 A.2d 6, 8 (Pa. Super. Ct. 1995) ("patently illegal"). In other words, the sentence's illegality will usually be apparent upon review of the relevant statutes, the conviction, and the sentence itself—without recourse to other portions of the record—because the terms and conditions of the punishment for that offense are impermissible as a matter of law.

In the instant case, defendant alleges that the trial court considered an impermissible factor in rendering its decision. Defendant did not object to the error, thereby preserving his claim for appellate review. He now asks this Court to

review the alleged sentencing error as an illegal sentence. Should he prevail and should this Court determine that the district court inappropriately considered defendant's deportation status, that decision would open the door to multitudinous claims of such error, raisable "at any time." Further, it would open the door to claims by the State that trial courts have erred in imposing sentences that are too lenient because they inappropriately considered (or failed to consider) some factor. These issues are appropriate for appeal, not for correction under rule 22(e). Alleged errors of this kind are not patently in violation of statute. They are not the kinds of errors that have traditionally merited review as possibly illegal sentences. This Court should decline defendant's invitation to review the alleged error in this case under rule 22(e).

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO THE STATUTORY INDETERMINATE PRISON TERM

Should this Court determine that review is proper, defendant's claim nonetheless fails on the merits. The record does not demonstrate that the district court based its sentencing on defendant's status as an illegal alien. In any event, consideration of defendant's status as an illegal alien subject to deportation does not violate the Supremacy Clause, due process, or equal protection.

A. The record does not demonstrate that the district court based its sentencing decision on defendant's status as an illegal alien.

Defendant argues that the district court "abused [its] discretion by sentencing appellant to prison based in part on his immigration status," i.e., "on the fact that [the] INS planned to deport [him]." Br. Aplt. at 7. The record does not support this assertion.

The PSI investigator recommended that defendant be sentenced to prison. PSI at 17. That recommendation was, in fact, based in part on defendant's immigration status. The investigator was concerned about defendant's assault offense and his lack of cooperation during preparation of the PSI. *Id.* at 16. She noted that defendant desired counseling for anger management and, under other circumstances, would have been "an appropriate candidate for probation after a lengthy period of jail." *Id.* She observed, however, that AP&P's options were "limited" by the INS plans to deport defendant. *Id.* Apparently, once released from jail, deportation proceedings would begin, precluding a supervised probation that might include anger management counseling.

Nothing in the record suggests that the district court judge adopted the PSI investigator's reasoning. At sentencing, the judge gave defendant, defense counsel, and the prosecutor the opportunity to speak. R. 167:3-7. The judge also received photographs of the injured baby, victim impact statements from the baby's mother

and grandmother, and the PSI. *Id.* at 3-5. Based on the evidence before him, the judge sentenced defendant to prison. *Id.* at 7.

The judge's only reference to the PSI was this: "Mr. Acosta-Torres, I am not of the view that the recommendation from AP&P is inappropriate." *Id.* at 7. The judge's statement reflects only that, like AP&P, he felt that the prison term was appropriate. It does not indicate that the judge found the sentence appropriate because of the INS deportation plans.

Rather, the trial judge's explanatory comments show that he considered the offense sufficiently severe to merit prison and that he imposed a prison term for that very reason. He said, "Indeed, anyone that would beat up on a child of this nature, in my estimation, really needs some serious thinking time, and I am concerned that you might allow yourself to fly off the handle again and endanger some other innocent victim out of society." *Id.* He then concluded, "I am therefore of the view, Mr. Acosta-Torres, that you ought to be committed to the Utah State Prison, and I'll order that to be accomplished forthwith." *Id.* at 8. The judge expressed no other reason for imposing a prison term. Defendant has not demonstrated, and it would be inappropriate to presume, that the sentence was based on defendant's immigration status. [4]

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[4]Where the record is "silent" on an issue, an appellate court "assume[s] regularity in the proceedings below." *State v. Mitchell*, 671 P.2d 213, 215 (Utah 1983) (record silent on issue); *see also State v. Wulffenstein*, 657 P.2d 389, 293 (Utah 1982) (defendant did not raise claim below and therefore issue did not appear in the record, making

B. Even if the district court considered defendant's status as an illegal alien subject to deportation, consideration of that factor did not violate any constitutional safeguard.

Defendant argues that imposition of the prison term, allegedly based in part on defendant's status as an illegal alien, violated the Supremacy Clause of the federal constitution and defendant's rights to both due process and equal protection under the law. Br. Aplt. at 6-7.[5] Defendant misapprehends the reach of the Supremacy Clause. Defendant has demonstrated no violation of his due process and equal protection rights.

1. Supremacy Clause

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, makes federal law binding on the states. State action, if incompatible with the legitimate exercise of federal power, loses its validity, even if taken within a sphere in which the state might otherwise act. *See License Cases*, 5 How. 504, 538 (U.S. 1847), *overruled in part on other grounds by Leisy v. Hardin*, 135 U.S. 100 (1890).

When determining whether state action violates the Supremacy Clause, a court's "primary function is to determine whether, under the circumstances of [the] particular case, [the state action] stands as an obstacle to the accomplishment and

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defendant's assignment or error "a unilateral allegation which the review court ha[d] no power to determine"), *abrogated on other grounds by State v. Ramirez*, 817 P.2d 774 (Utah 1991); *State v. Scott*, 447 P.2d 908, 910-911 (Utah 1968) (where record is unclear as to what happened in trial court, appellate court presumes that the proceedings "were conducted according to law").

[5]Defendant places no reliance on the Utah Constitution. *See* Br. Aplt at 6-7.

execution of the full purposes and objectives of Congress." *Goldstein v. California*, 412 U.S. 546 (1973).

Defendant here argues that the district court judge violated the Supremacy Clause when he factored INS plans to deport defendant into his sentencing decision. Br. Aplt. at 8-9. Assuming for purposes of this argument that the judge did consider the INS plans, defendant has not demonstrated that doing so "constituted an obstacle to the accomplishment and execution" of any Congressional purpose or objective. Nor can he.

Defendant argues, citing *Arviso*, 1999 UT App 38, at ¶ 7, that "[b]asing a sentence in a state case on a belief that the INS plans to deport the individual improperly steps into the federal immigration arena, thereby violating the Supremacy Clause." Br. Aplt. at 9. In *Arviso*, the trial court suspended a defendant's prison terms on the condition that the defendant not return to the United States. The defendant was later deported, but returned to Utah after a short time. The trial court consequently lifted the sentence suspension and reimposed the prison term. Because the conditional sentence interfered with the Congressional objective to assign "the sole power to exclude aliens" to the United States Attorney General, this Court concluded that the trial court had "trespassed into forbidden INS territory, violating the Supremacy Clause." *Id.* at ¶¶ 6-7.

The instant case is easily distinguishable. Here, the district court did not impose any order excluding or admitting an alien. The court did nothing to

interfere with Congressional mandates on immigration. If the district court considered the INS plans to deport defendant, it did merely that—it looked at the probable *federal* action with respect to defendant and imposed a sentence appropriate to accomplish state objectives in light of that *federal* action.

The sentence imposed did not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" merely because it considered the probable *federal* treatment of defendant. Imposition of a prison sentence or even the jail sentence defendant favors could interfere with INS action only if the confinement of any person subject to deportation constituted a violation of the Supremacy Clause. Defendant does not make that argument or point to any case law or INS policy suggesting that the confinement of alien convicts interferes with INS power to institute deportation proceedings and/or to deport.

2. Due Process

Defendant argues that a sentence based on any consideration of defendant's status as an illegal alien violates due process. Br. Aplt. at 10-15. Defendant misapprehends the law, and his cited cases are inapposite.

Defendant cites several cases holding that a sentencing decision based on nationality, ethnicity, or alien status violates due process guarantees. *See United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994); *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991); *United States v. Borrero-Isaza*, 887 F.2d 1349,

1352 (9th Cir. 1989); *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986). The State does not argue that a sentence based on those factors is permissible.

The question is rather whether a sentencing court may consider a defendant's illegal entry and/or his being subject to imminent deportation proceedings. Three of defendant's cited cases, *Leung*, *Onwuemene*, and *Borrero-Isaza*, do not mention illegal entry or status. In *Leung*, the trial judge made two remarks suggesting that the length of the defendant's sentence was based in part on her ethnic origin and alien status. 40 F.3d at 585. In *Onwuemene*, the trial judge imposed a sentence at the high end of the guideline range because the defendant was not a citizen of the United States. 933 F.2d at 651. In *Borrero-Isaza*, the trial judge enhanced the defendant's sentence because he came from Columbia, a drug "source country." 887 F.2d at 1351. Nothing in these opinions, however, suggests that any of the defendants had entered this country illegally.

Defendant also cites *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986). *See* Br. Aplt at 11. Noting that "[a]n illegal alien comes within the scope of the word 'person' guaranteed due process," the *Gomez* court nevertheless held that the sentencing court could properly consider the defendant's illegal alien status. "[T]he illegal act of an alien [entering this country] is entitled to no more deference than some other prior illegal act of a citizen also being sentenced for a drug violation." *Gomez*, 797 F.2d at 420. A sentencing judge need not "shut his eyes to the reality of the factual situation before him and pretend that the defendant is not

an illegal alien from Colombia who has pleaded guilty to a drug violation." *Id.* at 419. The judge properly considered, as part of the "reliable and pertinent information which might reasonably bear on the sentencing decision," that the defendant "came here illegally." *Id.* at 419, 420.

Gomez is consistent with abundant precedent holding that a sentencing court may consider either the "illegal status" of illegal aliens or, phrased perhaps more carefully, their having violated or disregarded immigration laws. *See People v. Sanchez*, 235 Cal. Rptr. 264, 267-278 (Cal. Ct. App. 1987) (sentencing court did not violate federal and/or state guarantees of equal protection or due process when it considered the defendant's illegal alien status in denying probation); *Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001) (sentencing court need not "close its eyes to the defendant's status as an illegal alien and his history of violating the law, including any law related to immigration"); *Viera v. State*, 532 So.2d 743, 746 (Fla. Dist. Ct. App. 1988) ("trial court could properly consider [the defendant's] illegal status in the country as a manifestation of his flagrant disregard for the laws of this country and a clear and convincing reason for [sentencing] departure"); *State v. Moreno*, 422 N.W.2d 56, 62-63 (Neb. 1988) (sentencing court properly considered lack of respect for the law, based in part on the defendant's having entered country illegally on several occasions); *People v. Kaplan*, 606 N.Y.S..2d 151, 151-152 (N.Y. App. Div. 1993) ("court is entitled to consider offenses for which a defendant has not been convicted, in addition to immigration offenses");

State v. Morales-Aguilar, 855 P.2d 646 (Or. App. 1993) (sentencing court may consider defendant's unwillingness to conform his conduct to legal requirements as evidenced by defendant's illegal residency).

Defendant has not pointed to case law holding that a sentencing court violates due process when it considers a defendant's having entered the country illegally or, as some courts have phrased it, a defendant's status as an illegal alien.[6] Further, abundant precedent supports the contrary position, i.e., that a court may properly and constitutionally consider those factors in its sentencing determinations. Defendant has not demonstrated a violation of due process.

3. Equal Protection

Defendant argues that "sentencing [defendant] to prison based on his status as an illegal alien violates equal protection because it does not serve a *state* interest, substantial or otherwise." Br. Aplt. at 18 (emphasis in original). Assuming again for purposes of this argument that the district court sentenced defendant to prison because of INS deportation plans, this action does not violate defendant's equal

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[6]Defendant points to only one case where the defendants were clearly illegal immigrants. *See Martinez v. State*, 961 P.2d 143 (Nev. 1998). The reviewing court stated that a sentencing decision based, "in part, upon [the defendants'] status as illegal aliens," violates their due process rights. *Id.* at 145. The case is, however, distinguishable. The *Martinez* court referred to the trial court's action as considering interchangeably the defendants' "status as illegal aliens," their "national origin," their "nationality," and their "foreign nationality." *Id.* at 145-146. The court never addressed the issue of illegal entry, and the case turned on a trial court remark about "people [who] come from foreign countries." *Id.* at 145.

protection rights. Undocumented aliens do not constitute a suspect class. *Plyler v. Doe*, 457 U.S. 202, 218, 223-224 (1982). Nor do undocumented aliens facing deportation. The State can and need only show that its action, i.e., the sentencing in this case, was rationally related to the attainment of a legitimate state interest, such as punishment, deterrence, rehabiliation, and/or protection of society.

The Equal Protection Clause of the United States Constitution forbids State action denying any person "the equal protection of the laws." U.S. CONST., amend. XIV, § 1. In other words, it directs that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. at 216 (internal quotation marks omitted). "But so too, [t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* (internal quotation marks omitted). The State and, in this case, its judiciary have "[t]he initial discretion to determine what is 'different' and what is 'the same.'" *Id.* They have "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived." *Id.*

The State may make classifications to further its interests: it may, for instance, treat criminals differently than non-criminals and murderers differently than shoplifters. For the most part, the classifications the State makes need only "bear[] some fair relationship to a legitimate public purpose." *Id.* In other words, the classification must relate rationally to the attainment of a legitimate state interest. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-175 (1980); *see also Board*

of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356, ___, 121 S.Ct. 955, 963-964 (2001) (rational basis review, "applicable to general social and economic legislation," requires only "rational relationship between the disparity of treatment and some legitimate governmental purpose"). Courts review most classifications deferentially. *See id.* at 964 (any rational basis suffices; State need not articulate reasoning; burden on challenging party to negative "any reasonably conceivable state of facts that could provide a rational basis for the classification").

Classifications based on certain "suspect classes," such as race, alienage, and national origin, however, must be more carefully drawn: they must be "narrowly tailored to the achievement of a compelling state interest." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (articulating standard for federal racial classifications); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494 (1989) (articulating standard for race-based action by state and local governments). The courts strictly scrutinize state action based on these classifications.

Finally, certain "quasi-suspect" classifications require intermediate or "heightened" scrutiny. These include classifications based on gender and legitimacy. *See Tuan Anh Nguyen v. INS*, 121 S.Ct. 2053, 2059 (2001) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (legitimacy). These classifications are constitutional only if they "further[] a substantial interest of the State." *Plyler*, 457 U.S. at 217-218. This standard has been applied to one case involving illegal aliens, *Plyler*, cited by defendant. *Id.*; *see* Br. Aplt. at 15-18. *Plyler* applied

"heightened scrutiny" to a classification burdening school children who were illegal aliens, but did not establish "illegal aliens" as a suspect or quasi-suspect class. 457 U.S. at 223-224, 230.

In *Plyler* the Supreme Court held unconstitutional a Texas statute withholding state funds for the education of children not legally admitted into the country. The statute also authorized local school districts to deny public school enrollment to those children. The Court concluded that the statute did not further any "substantial state interest" and therefore "[could] hardly be considered rational." *Id.* at 223-224. The Court did not, however, mandate the application of strict or heightened scrutiny to most classifications involving illegal aliens. *Id.* Rather, it held that, in view of the "lifetime hardship" that denying education would inflict "on a discrete class of children not accountable for their disabling status," the burden created by the classification would be irrational unless it "further[ed] some substantial goal of the State." *Id.* at 223-224.

The *Plyler* court observed, moreover, that "undocumented status is not irrelevant to any legislative goal" and is, except in the case of children, "the product of conscious, indeed unlawful, action." *Id.* at 220. Therefore, at least in the case of adults, classifications that burden illegal aliens need only "bear[] some fair relationship to a legitimate public purpose." *Id.* at 216. Likewise, classifications that burden illegal aliens facing pending deportation need only be rationally related to the attainment of a legitimate state interest.

Defendant argues that defendant's status as an illegal alien or as an illegal alien facing deportation is irrelevant to any legitimate state interest. Defendant's status is, however, relevant to a variety of legitimate interests. The State has a legitimate interest in punishing lawbreakers, rehabilitating them, deterring others from criminal behavior, and protecting society. *See Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

A defendant's status as an illegal alien is rationally related to the imposition or denial of probation. A defendant facing deportation will, in most cases, be deported shortly after his release from custody. To sentence a defendant in that posture to a jail term, to be followed by probation, means that the defendant will serve only the jail time. Deportation will follow his release from custody, and no meaningful probation will be possible. The defendant will not be present for supervision and required counseling. He will not be available for return to custody if he violates probation conditions. In effect, defendant will simply serve a reduced sentence. A court deciding between an indeterminate prison term and a briefer jail sentence followed by probation is, in reality, choosing only between the indeterminate prison term and the briefer jail sentence.

Because meaningful probation is impossible, defendant's status as an illegal alien who may or will be deported, is rationally related to the State's legitimate interests in punishment, rehabilitation, deterrence, and the protection of society. The State's interest in deterring criminal activity generally requires imposition of a

sentence sufficiently severe to discourage others from committing an offense. Further, the punishment appropriate for a certain offense is generally mandated by State law, and the State has an interest in imposing that punishment unless it determines that its interests are better met through a reduced sentence followed by probation. Finally, the State has an interest in rehabilitating the criminal who may, albeit illegally, reenter the country. All of these interests are comprehended in the State's interest in protecting society from criminal activity in general and from defendant, whose deportation may not effect his permanent removal, specifically. They are not only legitimate State interests but substantial state interests. *See State v. Morales-Aguilar*, 855 P.2d at 648 (upward sentencing departure appropriate where, "because [the defendant] faced immediate deportation, imposition of the presumptive probationary sentence would not accomplish the goals of the [sentence] guidelines"); *see also People v. Sanchez*, 235 Cal. Rptr. at 267 (denial of probation based, in part, on status as illegal alien did not violate equal protection; "[o]bviously, a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed").

Consideration of defendant's status is rationally related to these interests. Defendant's equal protection challenges fail under either a rational basis test or an intermediate scrutiny test.

C. Should this court vacate defendant's sentence, remand to the sentencing judge is appropriate.

Defendant argues that his sentence should be vacated and this case remanded for resentencing before a different judge. Br. Aplt. at 21. Defendant cites three cases where a trial judge improperly based a sentence on alienage and the reviewing court remanded to a different judge—*Leung*, 40 F.3d at 587, *Martinez v. State*, 961 P.2d 143, 146 (Nev. 1998); and *Kalbali v. State*, 636 P.2d 369, 371 (Okla. Crim. App. 1981). In each of these cases, the trial judge made comments about aliens that implied prejudice. *See Leung*, 40 F.3d at 585 ("[w]e have enough home-grown criminals in the United States without importing them"; "[t]he purpose of my sentence here is to . . . deter others, particularly others in the Asiatic community"); *Martinez*, 961 P.2d at 145 ("[t]here's something that heightens the nature of an offense when people come from foreign lands to do offenses in another land"); K*albali*, 636 P.2d at 370 (judge "was not going to spend the taxpayer's money of this State to rehabilitate somebody from Iran"). The reviewing courts therefore remanded to a different judge to satisfy "the appearance of justice." *Leung*, 40 F.3d at 587.

The judge in this case did nothing to suggest that he harbored any discriminatory animus toward aliens or that his sentence was based on defendant's foreign nationality. The above cases are inapposite. Remand to the trial judge is appropriate and in no way inconsistent with "the appearance of justice."

CONCLUSION

Defendant's conviction should be affirmed. Should his sentence be vacated, remand should be to the sentencing judge.

RESPECTFULLY submitted on August 14, 2001.

MARK L. SHURTLEFF
Attorney General

JEANNE B. INOUYE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were either mailed, postage prepaid, or hand-delivered to Joan C. Watt, Attorney for Appellant, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 30, Salt Lake City, UT 84111, this 14th day of Aug., 2001.

for Jeanne Inouye

ADDENDA

ADDENDUM "A"

tioning. State v. Heaps, 2000 UT 5, 999 P.2d 565.

Verdict forms.

There is no statute in this state requiring the court to prepare forms of verdict. It has, however, been the general practice of trial courts to do that, and it might be that, when they undertook to do so, they should have prepared forms as complete as the case requires. State v. Romeo, 42 Utah 46, 128 P. 530 (1912), overruled on other grounds, State v. Crank, 105 Utah 332, 142 P.2d 178 (1943).

Cited in State v. Young, 853 P.2d 327 (Utah 1993).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d Trial § 1750 et seq.

C.J.S. — 23A C.J.S. Criminal Law § 1395 et seq.

A.L.R. — Inconsistency of criminal verdict as between two or more defendants tried together, 22 A.L.R.3d 717.

Juror's reluctant, equivocal or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 A.L.R.3d 1149.

Validity and efficacy of accused's waiver of unanimous verdict, 97 A.L.R.3d 1253.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 A.L.R.4th 91.

Rule 21.5. Repealed.

Repeals. — Rule 21.5, establishing procedure for pleas claiming mental illness or insanity, was repealed effective January 1, 1996. For similar provisions, see § 77-16a-103.

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(Amended effective January 1, 1995; January 1, 1996.)

Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[MISCELLANEOUS PROVISIONS]

[Assumption of public debt — Supreme Law — Oath of office — Religious tests prohibited.]

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a qualification to any Office or public Trust under the United States.

ARTICLE VII

[ADOPTION]

[Ratification — Attestation.]

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same. Done in Convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven, and of the independence of the United States of America the twelfth. In Witness Whereof we have hereunto subscribed our names,

New Hampshire	JOHN LANGDON, NICHOLAS GILMAN.
Massachusetts	NATHANIEL GORHAM, RUFUS KING.
Connecticut	WM. SAML. JOHNSON, ROGER SHERMAN.
New York	ALEXANDER HAMILTON.
New Jersey	WIL: LIVINGSTON, DAVID BREARLEY, WM. PATERSON, JONA: DAYTON.
Pennsylvania	B FRANKLIN, THOMAS MIFFLIN, ROBT MORRIS, GEO. CLYMER, THOS. FITZSIMONS, JARED INGERSOLL, JAMES WILSON, GOUV MORRIS.
Delaware	GEO: READ, GUNNING BEDFORD JUN, JOHN DICKINSON, RICHARD BASSETT, JACO: BROOM.
Maryland	JAMES MCHENRY, DAN OF ST THOS. JENIFER, DANL CARROLL.
Virginia	JOHN BLAIR, JAMES MADISON JR.
North Carolina	WM BLOUNT, RICHD DOBBS SPAIGHT, HU WILLIAMSON.
South Carolina	J. RUTLEDGE, CHARLES COTESWORTH PINCKNEY, CHARLES PINCKNEY, PIERCE BUTLER.
Georgia	WILLIAM FEW, ABR BALDWIN.

In Convention Monday September 17th 1787.

Present The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved,

That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors, should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.
GO. WASHINGTON, Presidt. W. JACKSON, Secretary.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENTS I-X [BILL OF RIGHTS]
AMENDMENTS XI-XXVII

AMENDMENT XIII

Section
1. [Slavery prohibited.]
2. [Power to enforce amendment.]

Section 1. [Slavery prohibited.]
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. [Power to enforce amendment.]
Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section
1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]
4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]
No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

Section
1. [Right of citizens to vote — Race or color not to disqualify.]
2. [Power to enforce amendment.]

Section 1. [Right of citizens to vote — Race or color not to disqualify.]
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. [Power to enforce amendment.]
The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

[Income tax.]
The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

[Election of senators.]
The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII

[REPEALED DECEMBER 5, 1933. SEE AMENDMENT XXI, SECTION 1.]

Section
1. [National prohibition — Intoxicating liquors.]
2. [Concurrent power to enforce amendment.]
3. [Time limit for adoption.]

Section 1. [National prohibition — Intoxicating liquors.]
After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation the

ADDENDUM "B"

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SANTIAGO ACOSTA-TORRES, Defendant.	ORIGINAL Case No. 001912118FS

Sentencing Hearing
Electronically Recorded on
December 15, 2000

BEFORE: THE HONORABLE J. DENNIS FREDERICK
Third District Court Judge

For the State:

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PROCEEDINGS

(Electronically recorded on December 15, 2000)

THE COURT: State of Utah versus Acosta-Torres, Santiago, case No. CR-002118. Mr. Buividas -

MR. BUIVIDAS: That's correct.

THE COURT: -- you are appearing on behalf of this defendant, and Ms. Higgins --

MS. HIGGINS: Yes.

THE COURT: -- for the State?

MS. HIGGINS: Yes, your Honor.

MR. BUIVIDAS: If I may, your Honor, I have some letters for the Court.

THE COURT: Yes, you may, certainly. You are Santiago Acosta-Torres; is that correct?

MR. ACOSTA-TORRES: Yes, your Honor.

THE COURT: Mr. Buividas is here as your lawyer; is that correct?

MR. ACOSTA-TORRES: Yes, your Honor.

THE COURT: For the record, this is the time set for sentencing. The defendant entered a plea of guilty on the 13th of November of this year to the second-degree felony charge of child abuse. A presentence report has been ordered now, received and reviewed. Mr. Buividas, you've seen the report; have you not?

MR. BUIVIDAS: We have, your Honor.

THE COURT: Is there any legal reason known to you why I should not proceed with sentencing at this time?

MR. BUIVIDAS: I don't have any legal reasons. I do have a couple concerns about this report, if I may. The last two sentences —

THE COURT: Well, we'll deal with your opportunity to challenge the accuracy of the report in a moment, but you know of no legal reason why we shouldn't impose sentence?

MR. BUIVIDAS: No, your Honor. Okay.

THE COURT: All right. Then before I do so, do you wish to say anything on behalf of your client?

MR. BUIVIDAS: Yes, your Honor. The last two sentences of the evaluator's summary bother me a great deal, if I may disclose that. It says, "It should be noted --"

THE COURT: What page are you referring to?

MR. BUIVIDAS: It will be page 16 of the defendant's presentence report.

THE COURT: Okay, and the last paragraph, last two sentences?

MR. BUIVIDAS: Two sentences of that. "It should be noted the defendant would be considered an appropriate candidate for probation after a lengthy jail period or a period of jail. However, this agency's options are now limited, knowing that INS plans on deporting the defendant," and then they recommend prison.

I'm extremely bothered by it and I attempted to call the person that did this report, Stacy Smith, but she's out of the office until the 18th. I do know the State's planning on recommending a year in jail in this case, and I think that would be an appropriate resolution.

If the Court is strongly leaning towards prison, then I'd ask for some more time to at least talk to the officer and get to the bottom of it. I think it's not a very good report here in that regard.

THE COURT: All right, Mr. Buividas. Thank you.

Mr. Acosta-Torres, before I decide what to do here, do you have anything to say?

MR. ACOSTA-TORRES: Yes, your Honor, I do. I promise you today and I would like to tell you that I did wrong, and I'm sorry for what I did and I will take responsibility for what I did. I also want to tell you that I have a beautiful family waiting for me at home, a beautiful daughter and wife, and they need me just as well as I need them, and I mean, physically, morally, mentally, economically. I'm sorry for what I did and I will take responsibility, whatever you think is going to help me better myself. Thank you, your Honor.

THE COURT: All right, Mr. Acosta-Torres. Thank you.

Ms. Higgins, what is the State's position, and let me inquire further if we have anyone to speak on behalf of the victims?

MS. HIGGINS: Your Honor, the grandmother called me this morning, grandmother of the victim, and said that they wanted to come but they could not because of a death in the family. So they are not here, but both the mother and the grandmother filled out victim impact statements.

THE COURT: Yes, and I've seen those.

MS. HIGGINS: Your Honor, I have photos of the child, if I may approach.

THE COURT: Yes, you may. Well, let's see, I have a victim impact statement from the mother and grandmother, and these are photos here.

MS. HIGGINS: The State is recommending one year and deportation.

THE COURT: All right, Counsel, Ms. Higgins.

MR. BUIVIDAS: Let me add, your Honor, you know, he's going to be deported, it looks like. If that happens, if he comes back in the country, he's going to prison for the re-entry. The Court can still throw him in prison if he comes back. I know a lot of good prisons, and it's going to tie up resources of the State.

He is trying to make in jail there, make the best use of his time. If he can get his GED and high school diploma, he's planning on doing. That's probably the best thing the guy can do for himself at this point. He is taking some motivational classes on a weekly basis to discuss problems

with other inmates. He's going to an LDS substance abuse -- it's a 12-step program while he's in there on a regular basis.

You know, he came here as a young child with his family. I guess it was either in his early teens or just prior to that, you know, and had he taken some stuff a couple of years ago as he should have, he wouldn't be getting deported now, but unfortunately that's because, as the juvenile record reflects, he has a lack of responsibility in a certain regard.

The juvenile record there, he seems to think that a couple of the things are duplicates, and that may well be true. With all of the arrests, sometimes they put them on the same. His biggest problem as a juvenile, he ran away from home, so they ended up putting him in a proctor home, and he'd keep coming back to Court on that regard.

He has to learn from all this, your Honor. I don't know what's going to teach him anything more important. His family is here. He's got a very good family. They've been 100 percent supportive in trying to help him out and doing what they could to help him. His mother would like to address the Court, if that's okay. No? Okay.

THE COURT: No. I'll hear from victims, but I don't hear from relatives of defendants.

MR. BUIVIDAS: Okay, I kind of thought that might be the case.

THE COURT: Okay.

MR. BUIVIDAS: But anyway, we would just ask for a year of jail -- or even, you know, if the Court's inclined, credit for time served that he has done. He has done 155 days. He has taken responsibility.

I know that those pictures are awful and they're very serious. I think we're grateful, according to the reports here, that there's been no permanent injury or serious injury to the child other than what you see on the pictures there, which is not minimizing one bit, but it appears the baby -- everything is on track for the baby, and he's been extremely sorrowful, and his whole time in jail he has mourned.

THE COURT: All right, Mr. Buividas. There being no legal reason why I should not impose sentence, I will do so at this time, Mr. Acosta-Torres. It is the judgment and sentence of this Court that you serve the term provided by law in the Utah State Prison of 1 to 15 years for the second-degree felony charge for which you have pled. I will order moreover that you pay as restitution any and all counseling and/or medical expenses incurred by this victim or the mother of the victim.

Mr. Acosta-Torres, I am not of the view that the recommendation from AP&P is inappropriate. Indeed, anyone that would beat up on a child of this nature, in my estimation, really needs some serious thinking time, and I am concerned that you might allow yourself to fly off the handle again and endanger some other innocent victim out in society.

I'm therefore of the view, Mr. Acosta-Torres, that you ought to be committed to the Utah State Prison, and I'll order that that be accomplished forthwith. I will grant you credit for the 155 days that you've now served awaiting disposition of this matter, and you can take while you're there, if you're able and inclined to do so, anger management training and classes. Good luck to you. Thank you, Counsel.

(Hearing concluded.)